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**In The  
Supreme Court of the United States**

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**PHILIP MORRIS USA INC.,**

*Petitioner*

v.

**JUDY BOEKEN, AS TRUSTEE, ETC.**

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**On Petition For Writ Of Certiorari  
To The Court Of Appeal Of California**

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**BRIEF FOR THE CHAMBER OF COMMERCE OF  
THE UNITED STATES OF AMERICA  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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**BRIEF FOR THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA AS  
AMICUS CURIAE IN SUPPORT OF PETITIONER**

The Chamber of Commerce of the United States of America (the Chamber) respectfully submits this brief as *amicus curiae* in support of the petition for a writ of *certiorari* in this case.<sup>1</sup>

**INTEREST OF AMICUS CURIAE**

The Chamber is the nation's largest federation of business companies and associations. It has an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. One important function of the Chamber is to represent the interests of its members by filing briefs as *amicus curiae* in cases involving issues of national concern to American business.

The Chamber is filing the instant brief to address the second question presented by the petition, which raises recurring issues about the proper application of the substantive standards for constitutional review of awards of punitive damages that are of great concern to the Chamber's members.<sup>2</sup> The decision of the California Court of Appeal that petitioner asks this Court to review has further undermined the goals of precluding arbitrary and excessive punitive damages awards and of ensuring the national uniformity and fair notice that underlie this Court's decisions applying the Due Process Clause to

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<sup>1</sup> Letters from petitioner and respondent indicating their consent to the filing of this brief are being filed with the Clerk of this Court along with this brief. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> *Amicus* does not address in this brief the first question presented regarding the preemptive scope of federal law.

punitive damages awards. The Chamber therefore respectfully urges the Court to grant the petition for a writ of *certiorari* and to review and reverse the California Court of Appeal decision in this case, which sustained a \$50 million punitive damages award against a single defendant in favor of a single plaintiff.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The failure of the California Court of Appeal to abide by the holding and rationale of this Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), both exemplifies and increases the risk of grossly excessive punitive damages awards that further no legitimate purpose and constitute the "arbitrary deprivation of property" against which *State Farm* warned. *Id.* at 417. The \$50 million award of punitive damages imposed by the Court of Appeal in this case reflects just such arbitrary action, particularly in light of the already huge compensatory award of \$5.5 million, and the fact that the punitive damages are based in part on purported harm to persons not before the trial court who can bring suit in their own right to attempt to recover for their own alleged damages from petitioner and whose cases might differ in material respects from that of respondent.

A. The California Court of Appeal's punitive damages award appears to be based on a mistaken view that any single-digit ratio between punitive and compensatory damages necessarily satisfies the second constitutional guidepost set forth in *State Farm*, which measures "the disparity between the actual or potential harm suffered by the plaintiff," *i.e.*, the compensatory damages, and "the punitive damages award." 538 U.S. at 418. This approach rests, in effect, on a misreading of *State Farm* as establishing a "single-digit safe harbor" and is shared by several other courts. By contrast, some lower courts correctly understand that *State Farm* established no such safe harbor. Those courts, when reviewing the ratio between compensatory and punitive damages, take into account the



extent to which the compensatory damages in a particular case already include a punishment component or may already serve as a significant deterrent. Consideration of the amount and impact of the compensatory damages in the circumstances of a specific case serves as an important constitutional check on the punitive damages awards in those jurisdictions. That constitutional limit is being ignored in the jurisdictions that rely on a single-digit safe harbor.

That safe harbor approach exacerbates the absence of substantial uniformity across the country, eliminates fair notice to defendants, and undermines the due process safeguards that *State Farm* aimed to effectuate. It will encourage greater forum shopping by plaintiffs in cases against defendants engaged in nationwide commerce. That is especially true where, as here, it is not only the state court that misreads *State Farm*, but also the regional federal court of appeals. In California, where both state courts and the Ninth Circuit generally apply *State Farm* only as setting a single-digit outer limit, large interstate defendants can find no relief from the erroneous application of due process protections through removal to federal court.

B. This case also demonstrates the greater risk of unpredictable, arbitrary punitive damages awards that arises when, contrary to *State Farm*, a court allows a punitive damages award to be based on consideration of purported harms to individuals who are not parties to the case. There is an increased likelihood that the defendant will be substantially punished for conduct that either (1) will never be found by another jury to give rise to liability under governing legal standards or (2) will be the subject of a punitive damages award by another jury in an amount that fails to take into account that the same defendant has already been punished for the same conduct and harm in the earlier case. The first scenario of punishment for unproven liability is likely when an issue such as reliance or contributory negligence is relevant and will necessarily vary from case to case. The second scenario of multiple

punishment for the same harm is likely when the later jury sees no reason to deny a recovery to the plaintiff in front of it based on an earlier recovery by a different plaintiff.

When faced with such bleak and patently unfair potential outcomes due to a failure of courts to comply with *State Farm*, defendants are pressured to enter settlements at levels that would not be economically warranted if the courts correctly prohibited overlapping awards. Defendants are forced to settle a particular case regardless of the likelihood of losing because the threatened financial exposure in that case significantly exceeds the compensatory and punitive liability associated with that plaintiff's claim. The inordinate economic risks overdeter businesses from engaging in lawful commercial activities.

### ARGUMENT

#### **REVIEW IS WARRANTED BECAUSE THE RULING BELOW CONTRIBUTES TO AN ON-GOING DIVISION IN THE LOWER COURTS AND INCREASES THE RISK OF UNCONSTITUTIONALLY EXCESSIVE PUNITIVE DAMAGES, ARBITRARY DEPRIVATION OF PROPERTY, AND MULTIPLE PUNISHMENTS**

Review by this Court of the decision below, which sustained a \$50 million punitive damages award more than nine times larger than the substantial compensatory damages of \$5.5 million also awarded, and did so by relying on alleged harm to persons not before the court, i.e., nonparties, would permit the Court to correct two significant errors. These errors are being made in a number of lower courts in their efforts to apply the prohibition under the Due Process Clause of the Fourteenth Amendment against "grossly excessive or arbitrary" punitive damages awards. *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

In the last 15 years, this Court repeatedly has provided guidance to the lower courts about application of the demanding standards of the Due Process Clause to the virtually infinite array of factual situations in which juries



award punitive damages. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Nevertheless, there remains a marked conflict among courts in their understanding and application of the principles established by this Court.

Since the Court's most recent decision on the subject in 2003 in *State Farm*, 538 U.S. at 418, almost 200 federal and state court decisions have purportedly applied the three guideposts analyzed in *State Farm* to determine whether particular punitive damages awards were unconstitutionally excessive.

Unfortunately, various courts, including the court below, have disregarded the clear instructions in *State Farm* about how to apply the first and second guideposts, which involve "the degree of reprehensibility of the defendant's misconduct" and "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." *Id.* at 418.<sup>3</sup> These errant decisions undermine this Court's efforts to effectuate the Due Process Clause's assurance that defendants are not subject to grossly excessive or arbitrary awards and are given "fair notice not only of the conduct that will subject [them] to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 417 (quoting *Gore*, 517 U.S. at 574).

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<sup>3</sup> Like the decision below, most of these cases do not focus on the third guidepost regarding "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases," 538 U.S. at 418, which this brief also does not address.

**A. The Decision Below Joins A Growing Line Of Cases That Ignore *State Farm's* Holding And Adopt A Single-Digit Safe Harbor, Regardless Of The Substantiality Of The Compensatory Damages**

1. In the two and a half years since this Court issued its decision in *State Farm*, the greatest disagreement among lower courts reviewing punitive damages awards for constitutional excessiveness concerns the application of the second guidepost. The courts do not agree on the proper application of the directive to consider the ratio between the compensatory damages awarded to the plaintiff and the punitive damages awarded. These conflicting rulings may reflect a hostility to the substantive standards established by the Court or may result from a misunderstanding of them. In either event, the only means for reconciling the differences and establishing substantial uniformity in state and federal courts across the country is for this Court to take up the issue and ensure that courts (particularly those reviewing jury verdicts arising out of California) follow the dictates of *State Farm*. Absent further intervention by this Court, the divergence among and between the conduct of state and federal courts and this Court's holding will only widen further. See *State Farm*, 538 U.S. at 431 (Ginsburg, J., dissenting) (noting that "the Court 'work[s] at this business of checking state courts alone,' unaided by the participation of federal district courts and courts of appeals") (brackets omitted).

*State Farm* held that the permissible ratio of punitive to compensatory damages varies inversely with the amount of compensatory damages awarded to the plaintiff. The Court first declared that "few awards exceeding a single-digit ratio between punitive and compensatory damages" will "satisfy due process." 538 U.S. at 425. And it restated the Court's conclusion in *Haslip*, 499 U.S. at 23-24, emphasizing that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." 538 U.S. at 425.

Only where "a particularly egregious act has resulted in only a small amount of economic damages" to the plaintiff, is it the case that "ratios greater than those we have previously upheld may comport with due process." *Ibid.*

Conversely, and most relevant to this case but ignored by the court below, *State Farm* explained that when compensatory damages are "substantial," such as the \$1 million compensatory award in that case and the \$5.5 million compensatory award in this case, "then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Ibid.*; see *id.* at 429 ("the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages").

The court below is not alone in failing to follow the Court's instructions with regard to these ratios. Numerous lower courts ignore the four-to-one ratio that nears the constitutional line in typical civil litigation as well as the one-to-one guide for cases involving substantial compensatory damages. Those courts read the usual unconstitutionality of ratios that are greater than single-digit, instead, as a safe harbor for any lesser award.

2. Following *State Farm's* instruction, some courts have properly held that when substantial compensatory damages are awarded, a punitive damages award may not materially exceed the compensatory damages award. For example, in *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005), the Eighth Circuit applied *State Farm* to reduce punitive damages against a tobacco company for a design defect claim to equal the compensatory damages, holding that absent "[f]actors that justify a higher ratio," "a ratio of approximately 1:1 would comport with the requirements of due process" given "the substantial compensatory damages award." 394 F.3d at 603 (remitting punitive damages award from \$15 million to \$5 million in light of \$4,025,000 compensatory damages); see also *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th

Cir. 2004) (remitting punitive damages award for racially discriminatory work environment from \$6 million to \$600,000, equal to the compensatory damages).<sup>6</sup>

Indeed, the appellate court below expressly acknowledged that "most cases addressing punitive damages in the context of an award of compensatory damages exceeding \$1 million have found" low single-digit ratios "more appropriate." Pet. App. 65a-66a. But instead of following those courts and this Court's reference points of a four-to-one ratio in typical cases and a one-to-one ratio in cases of substantial compensatory damages, the court below followed a line of decisions that ignore *State Farm*. These courts deem punitive damages awards not excessive so long as the ratio does not exceed single digits, regardless of the substantiality of the compensatory damages. By treating any single-digit ratio as a safe harbor, these courts fail to engage in the "[e]xacting appellate review" required by *State Farm*, 538 U.S. at 418.

The Ninth Circuit, for example, has generally refused to read *State Farm* to require any special justification to sustain a punitive damages award materially greater than a substantial compensatory award so long as the ratio does not reach double digits. "We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case." *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003), *cert. denied*, 541 U.S. 902 (2004); *see also Greenberg v. Paul Revere Life Ins. Co.*, 2004 WL 74630, at \*2 (9th Cir. Jan. 12, 2004) (sustaining \$2.4 million punitive damages award, 4.4 times larger than compensatory

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<sup>6</sup> Even a one-to-one ratio of punitive damages to compensatory damages does not provide a safe harbor from a challenge of unconstitutional excessiveness in all circumstances. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 63-64 (2d Cir. 2004) (vacating judge-imposed punitive damages award of \$2.1 billion, an amount equal to the compensatory damages award, for further consideration of, *inter alia*, "the extent to which a punitive award is needed to deter"), *cert. denied*, 125 S. Ct. 2270 (2005).